77-1639

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

CHARLES EDWARD HAMPTON,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Sixth Circuit

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To the United States Court of Appeals for the Sixth Circuit

Charles Edward Hampton, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled cause on March 2, 1978.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Sixth Circuit on March 2, 1978, in an order which has not been officially reported. The order is reproduced as Appendix A hereto. No separate opinion was written by the Court of Appeals.

On April 17, 1978, the Court of Appeals denied petitioner's petition for rehearing and suggestion of appropriateness of rehearing en banc. (See Appendix B.) No opinion was written, and the order has not been officially reported.

The United States District Court for the Western District of Tennessee entered two orders relevant to this petition—granting a severance (Appendix C) and overruling a motion to dismiss the indictment (Appendix D).

JURISDICTION

The judgment of the United States Court of Appeals was entered on March 2, 1978. (See Appendix A.) A timely petition for rehearing and suggestion of appropriateness of rehearing en banc was denied on April 17, 1978. (See Appendix B.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Whether the District Court erred in overruling defendant's pre-trial motion to dismiss the indictment (A-16), which was based upon pre-trial delays caused by the government's appeal from the Court's sustaining a motion to suppress evidence and the government's subsequent withdrawal of said appeal, as a result of which the government gained a tactical advantage over defendant, including the questions of:

A. Whether prejudice must be shown in addition to the tactical advantage.

B. If prejudice is required, which party has the burden of proof on the issue and what constitutes a sufficient showing of prejudice.

C. What constitutes a sufficient showing of tactical advantage.

II

Whether the District Court erred in admitting evidence concerning discrepancies in oral statements made by petitioner at the time of his arrest, resulting in impeachment of the credibility of petitioner who did not testify as a witness at the trial.

III

Whether the District Court erred in admitting evidence of other alleged criminal acts of petitioner prior to the dates alleged in the indictment and far removed from the scene of trial, without advance notice by the prosecution of an intent to use such evidence.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes of the United States

Title 18, United States Code

§ 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney

certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

Federal Rules of Appellate Procedure

Rule 30. Appendix to the Briefs

(b) **Determination of Contents of Appendix; Cost of Producing**. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, he shall, within ten days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Federal Rules of Evidence

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling him.

STATEMENT

Petitioner Charles Edward Hampton, defendant below, was convicted on a three-count indictment (A-4),[1] charging him and

[1] References in this petition to "A-" are to the pages of the Appendix filed in the Court of Appeals, a copy of which is being filed with this petition, as numbered at the bottom of each page. Reference to "Exh. A-" are to the pages of the separate volume of Exhibits to Appendix filed in the Court of Appeals, a copy of which is being

James Thomas Elliott, Jr. with violations of federal law. Count One charged that, between September 20, 1975, and October 13, 1975, petitioner and Elliott conspired with each other and others unknown, in violation of 18 U.S.C. § 371, to transport stolen motor vehicles in interstate commerce. Count Two charged that, on September 27, 1975, petitioner transported a stolen 1967 International Harvester roll back bed truck from Tennessee to Missouri, in violation of 18 U.S.C. § 2312 and 2. Count Three charged that, on October 13, 1975, petitioner and Elliott transported a stolen 1972 John Deere tractor from Tennessee to Minnesota.

Petitioner and Elliott were originally indicted on February 10, 1976 (A-1). In August, 1976, Elliott failed to appear in Court, in violation of the terms of his bond, and a warrant was issued for his arrest (8/27/76 Tr. 3-6, A-56-59). Thereafter, on October 1, 1976, petitioner's motion to suppress evidence illegally seized from him was heard by the District Court[2] (A-1), and on November 2, 1976, the motion was sustained in large part and most of the evidence seized after his arrest was ordered suppressed (A-2).

On November 8, 1976, the government filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit from the order sustaining the motion to suppress (A-12, 17), pursuant to 18 U.S.C. § 3731. The government ordered the

filed with this petition, as numbered at the bottom of each page. References to "Tr." are to the pages of the trial transcript which are numbered on the upper right hand corner in the original transcripts, as well as on those pages reproduced in the Appendix. References to "8/27/76 Tr.", to "10/1/76 Tr.", to "1/28/77 Tr.", and to "5/5/77 Tr." are to the pages of transcript of pretrial hearings and sentencing held on those dates, which are numbered on the upper right hand corner in the original transcripts as well as on those pages reproduced in the Appendix.

[2] The Honorable Harry W. Wellford, United States District Judge for the Western District of Tenessee. Judge Wellford also presided at the trial.

transcript of the hearing from the court reporter (A-17), but took no further steps to proceed with the appeal and on February 1, 1977, upon motion of the government (A-25), the appeal was dismissed by the Court of Appeals.

In the meantime, on October 27, 1976, Elliott was apprehended (1/28/77 Tr. 11, A-73); ultimately, after his plea of guilty to the instant charges and a charge under the Bail Reform Act, he testified as a witness against petitioner at this trial (Tr. 435 ff).

Trial of this case against petitioner commenced on March 14, 1977, and the cause was submitted to the jury on March 17, 1977. The jury returned a partial verdict of guilty as to two counts on that date (Tr. 750, A-47), and guilty as to the remaining count on March 18 (Tr. 754, A-50).

Various witnesses and documents were offered in behalf of the government; petitioner called no witnesses. The sufficiency of the evidence was not raised as an issue in the Court of Appeals, nor is it in this petition (although it would be an issue if certain evidence had not been admitted, as presented in this petition); accordingly petitioner will not detail the evidence introduced on behalf of the government. Suffice it to say that the evidence tended to show that petitioner and Elliott had stolen motor vehicles in Indiana and Tennessee, and transported them to various states, including Missouri and Minnesota. The crucial evidence implicating petitioner in the thefts and interstate transportation came from the testimony of Elliott. At the time of his appearance as a government witness at the trial herein, Elliott had pleaded guilty to the charges in the instant indictment, a related charge in the District Court in Indiana, and another charge of bail jumping, but had not been sentenced. He had a number of prior convictions, and numerous other charges which were potential threats to him had not been filed; he was hopeful for leniency in sentencing and that he would

not be charged with the additional offenses (Tr. 435-440, 510, 571-584).[3]

Three issues are being raised in this petition:

1. Petitioner contends that the appeal taken by the government to the Court of Appeals from the order sustaining the motion to suppress evidence caused a pre-trial delay and gave a tactical advantage to the government by securing the testimony of Elliott.

2. Petitioner contends that the government was improperly permitted to impeach the credibility of petitioner, even though he did not testify as a witness, when the government was allowed to offer evidence contradicting statements made by petitioner to arresting officers.

3. Petitioner contends that the government was improperly permitted to offer evidence of another alleged interstate theft and transportation although it was not charged in the indictment and was prior in time to the indictment period.

The factual background of these three issues is developed more fully in the Reasons section of this petition.

At the close of the government's case, petitioner's motion for judgment of acquittal was overruled, and petitioner did not testify or present any further evidence. The cause was submitted to the jury on all three counts, and the jury at first found petitioner guilty as to Counts One and Three (Tr. 750, A-47). They recessed for the evening without having reached a verdict as to Count Two (Tr. 752, A-49), and on the next day returned

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[3] After his testimony in the trial herein, Elliott was sentenced to a total of six years confinement for all of his offenses. Petitioner, who had no prior felony convictions, was sentenced to imprisonment for ten years and a $5000.00 fine (5/5/77 Tr. 12-13).

a verdict of guilty as to that Count (Tr. 755, A-51). Petitioner's post-trial motion was overruled (A-3), and on May 5, 1977, petitioner was sentenced (A-3, 5/5/77 Tr.).

Petitioner duly filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit (A-3). His bond was revoked at the time of sentencing, and his motion for release pending review was denied by Mr. Justice Stewart on August 10, 1977. (See No. A-54 in this Court). Petitioner is presently confined in the Medical Center for Federal Prisoners at Springfield, Missouri.

Petitioner duly perfected his appeal to the Court of Appeals, and on March 2, 1978, a panel of the Court of Appeals filed an unsigned order (Appendix A) affirming petitioner's conviction. Petitioner's timely petition for rehearing and suggestion of appropriateness of rehearing en banc was denied on April 17, 1978. (See Appendix B.)

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I

Pre-Trial Delay

Petitioner and James Thomas Elliott, Jr. were indicted on February 10, 1976 (A-1, A-4). Elliott was apprehended on March 1, 1976, and shortly after that he made certain incriminating statements to an FBI agent, also implicating petitioner (1/28/77 Tr. 7, A-69).

Subsequently there were discussions between the government and Elliott as to a possible plea of guilty on his part, and it was anticipated that the plea would be entered on August 27, 1976 (8/27/76 Tr. 3, A-56, 1/28/77 Tr. 8, A-70). When petitioner's new counsel (Mr. Baris) appeared and requested a continuance in behalf of petitioner, the government's position was equivocal, depending upon Elliott's availability and action. If Elliott were to plead guilty, then the government opposed the motion for continuance, but when it was obvious that Elliott was not appearing, the government joined in the motion for continuance, for "the government doesn't want to try this case, but once" (8/27/76 Tr. 4, A-57). Accordingly the case was continued without a specific resetting (8/27/76 Tr. 5-9, A-58-62).

On September 7, 1976, petitioner filed a motion for a severance (A-8), which was heard on October 1, 1976 (10/1/76 Tr.), along with a motion to suppress evidence. At the hearing, the government's position was again equivocal (10/1/76 Tr. 4-6), obviously to be determined by what Elliott might do in the way of a plea of guilty and his availability as a witness against petitioner. The government also desired to try both defendants together and hopefully use Elliott's statements, despite *Bruton v. United States*, 391 U.S. 123 (1968). It should be remembered that Elliott was still at large as a bail jumper,

but at this time, the government still hoped to be able to use evidence seized from petitioner (later determined to have been illegally seized).

On October 27, 1976, Elliott was again apprehended, and he was held without bond on the pending charges and an additional charge of violation of the Bail Reform Act (1/28/77 Tr. 11, A-73). Shortly after that, the government's position as to petitioner became somewhat clouded again because on November 2, 1976, the District Judge sustained petitioner's motion to suppress much of the prosecution evidence. The government realized that unless Elliott became available as a witness against petitioner, its case against petitioner was jeopardized (1/28/77 Tr. 12, A-74). On November 8, 1976, the government filed a notice of appeal from the Court's action on the motion to suppress evidence, the appeal being pursuant to 18 U.S.C. § 3731, and shortly afterward, Elliott was indicted for an additional offense under the Bail Reform Act. The government ordered the transcript of proceedings on the motion to suppress, and the appeal was docketed in the United States Court of Appeals for the Sixth Circuit (1/28/77 Tr. 12, A-74). The government did not, however, file the certificate required by 18 U.S.C. § 3731 that the appeal was not taken for the purpose of delay (1/28/77 Tr. 22, A-84), nor did the government ever file the statement of issues or designation of parts of the record to be included in the appendix, required by Rule 30(b) of the Federal Rules of Appellate Procedure and Rule 10(c) of the Court of Appeals.

In the meantime, it appears from the documents produced by the government on January 28, 1977 (see Exhibits to Appendix) that there were discussions between the Assistant United States Attorney in Memphis and the Department of Justice concerning the continuation of the appeal. There were apparently continuing discussions with Elliott as to a plea of guilty and his use as a witness against petitioner.

On December 3, 1976 (three months after the filing of the original motion for severance by petitioner), the government filed a response and a separate motion for severance (A-10) stating its desire to try Elliott first; the government was now also requesting a severance[4] and indicating that there was indeed a *Bruton* problem and that Elliott should be tried first, reciting the pendency of the appeal as to petitioner. The government, however, did not advise the District Court that serious consideration was being given to a dismissal of the appeal.

Within a few days, on December 7, 1976, the District Court entered its order (A-15) granting the severance, and set the trial of Elliott prior to the trial of petitioner. The Court stated that this was done "in lieu[5] of the intervening appeal in the case pertaining to Hampton on the Court's ruling on a matter of evidence." (A copy of the order granting the severance is attached hereto as Appendix C.)

Later, it became obvious to petitioner that the government had been using these delays and the appeal as a means of putting pressure on Elliott to testify as a witness against petitioner, and that once the government had accomplished its purpose, it moved to dismiss its appeal to the Court of Appeals. Therefore, on January 10, 1977, petitioner filed his motion to dismiss the indictment because of the pre-trial delay (A-16), and on January 24, 1977, his motion requesting that the government's entire file with reference to the appeal and decision to dismiss the appeal, as well as the disposition of the charges against Elliott, be disclosed (A-22).

On January 28, 1977, a hearing was held on the motion to dismiss (A-63 to A-101). At its conclusion, the government turned over to petitioner a copy of what it represented to be the

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[4] Compare with the government's statement on August 27, 1976, that it did not want to try the case "but once" (8/27/76 Tr. 4, A-57).

[5] The District Court probably meant "in view".

entire[6] file concerning the earlier appeal and the decision to dismiss it. The District Court had indicated its intention of overruling the motion to dismiss at the time of the hearing on January 28 (A-94) but gave counsel an opportunity to furnish written argument. Both sides filed them on February 7, 1977, and on the next day, the District Court entered its order (A-42) overruling the motion to dismiss, on the basis that there was no evidence of the government's effort to gain an improper tactical advantage over petitioner nor any showing of prejudice (A-44). (A copy of the order overruling the motion to dismiss is attached hereto as Appendix D.)

We believe that the facts in this case make it clear that the government's appeal was not for legitimate reasons, but instead was for the purpose of delaying the proceedings against petitioner in order to secure Elliott as a witness and thereby to fill the void created by the Court's adverse rulings on the motion to suppress evidence. As a result of these delays, the government was able to take tactical advantage of petitioner, contrary to law.

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[6] Nothing was furnished to petitioner with reference to the discussions leading up to disposition of charges against Elliott. Furthermore, an examination of the documents which were delivered, copies of which are included in a separately bound volume of Exhibits to Appendix, creates doubt as to whether the complete file has been revealed. For example, it is strange that there was no reference in any of these documents to Elliott's status, nor even any mention that there was a co-defendant. In the final memorandum from the Assistant Attorney General, Criminal Division, to the Solicitor General dated December 8, 1976 (Exh. A-17), there was a handwritten note from "ALF", who was not otherwise identified, in which he stated: "But I understand that evidence [referring to the suppressed evidence of the Minnesota searches] is not of sufficient importance to require appeal." It is unclear where he got his understanding, and we suspect that there had been some discussion about the use of Elliott to fill the void of the suppressed evidence, inasmuch as Elliott was on the trip to Minnesota and fled the scene at the time of petitioner's arrest.

The file with reference to the dismissal of the appeal is more significant by what it omits than by what it contains. It is respectfully suggested that this Court exercise its supervisory powers to require the government to produce the complete files of the United States Attorney in Memphis and the Department of Justice in Washington.

From the documents disclosed by the government, it is clear that the notice of appeal was filed by the Assistant United States Attorney without complying with statutory requirements, without Justice Department authorization or compliance with Department policy, and for a purpose other than appellate review of the District Court's ruling. The provisions of 18 U.S.C. § 3731 were not complied with, in that the United States Attorney did not certify "to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding."[7]

Section 3731 grants thirty days in which the appeal may be taken. Here the Assistant United States Attorney filed the notice of appeal six days after the District Court's ruling. As the memorandum dated December 3, 1976, from the Chief, General Crimes Section, to the Chief, Appellate Section, Criminal Division, indicates in the Miscellaneous section (Exh. A-21), there is apparently a Justice Department policy, of which the prosecutor was reminded, "that protective notices of appeal should not be filed until about the 27th day after the court order issues." Here, the notice of appeal was filed contrary to that policy, and we believe it demonstrates the intent to prevent a setting of this case prior to the disposition of the charges against Elliott.

As previously mentioned, on December 3, 1976, the government filed its Response to Motion of Defendant Hampton for a Severance and Motion of the United States for a Severance (A-10). Reference is made in that response to the pendency of the appeal (A-12), which was obviously a crucial factor in the

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[7] Although we recognize that some Courts have held that the failure to timely file the certificate under § 3731 is not jurisdictional to the appeal—*United States v. Crumpler*, 507 F. 2d 624 (5th Cir. 1975), *United States v. Kleve*, 465 F. 2d 187, 190 (8th Cir. 1972), and *United States v. Welsch*, 446 F. 2d 220 (10th Cir. 1971)—we believe the failure to comply with the statute is indicative of the bad faith effort to delay the trial of petitioner so as to gain a tactical advantage over him.

District Court's Order of December 7, 1976, ordering a severance and setting the trial of Elliott before the trial of petitioner, for the Court stated that the order was entered in view "of the intervening appeal in the case pertaining to Hampton on the Court's ruling on a matter of evidence" (A-15). We submit that the government should, in fairness, have informed the District Court of the pending discussions concerning the withdrawal of the appeal and of the fact that on December 2, 1976, the Assistant United States Attorney talked by telephone with Mr. Steve Wejlian of the Criminal Division of the Department of Justice in Washington who "doesn't think we can prevail on appeal"—the Assistant United States Attorney also made the notation: "withdraw request" (Exh. A-6).

On the next day (the same day on which the response to the motion for severance was filed, with the request (A-12) to try Elliott first), there was apparently a direction to postpone the withdrawal of the notice of appeal until something else took place (Exh. A-7). Also on December 3, 1976, the Chief, General Crimes Section wrote the Chief, Appellate Section, Criminal Division: "We recommend no appeal of this court order. The AUSA agrees with this recommendation" (Exh. A-21). All of this, we reiterate, on the very day that the Assistant United States Attorney was asking the District Court to set the Elliott trial prior to the Hampton trial and reminding the District Court of the appeal!

It is obvious that the government concealed from the District Court and petitioner the imminent dismissal of the appeal. The government's regard for the appeal was not revealed until after the government had accomplished its purpose of getting a new trial setting of Elliott before Hampton and of thereby being able to make its deal with Elliott.

Although *United States v. Marion*, 404 U.S. 307 (1971), involved pre-indictment delay, the following language is applicable here (l.c. 324, 325):

> "Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an *intentional device to gain tactical advantage over the accused*. . . .
>
> "Nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government *intentionally delayed to gain some tactical advantage over appellees* or to harass them." [Emphasis supplied.]

Marion thus speaks of prejudice and the intentional device of delay to gain tactical advantage. The Court of Appeals did not discuss the speedy trial issue (or any other issue) in its order (Appendix A) affirming petitioner's conviction, the District Court, in its order (Appendix D) overruling the motion to dismiss, concluded that the evidence did not show that the government's appeal was taken to gain an improper tactical advantage over petitioner, and also that petitioner had not shown prejudice from the delay. As appears from the transcript of proceedings at the hearing on the motion to dismiss (1/28/77 Tr. 33, A-95) the District Court interpreted *Marion* to require a showing of both prejudice and intentional delay. Although, as hereafter indicated, we do not believe prejudice must be shown in the circumstances of this case, we submit nevertheless that there was a sufficient demonstration of prejudice by the passage of time while the appeal was pending and also by the fact that Elliott would not have been a witness against petitioner but for the delays. The tactical advantage achieved by the government is sufficient in itself to prove prejudice.

But even if there has been no showing of prejudice, we believe that we are not required to demonstrate both elements.

There was an adequate showing of the intentional delay by the government to gain the tactical advantage over petitioner, and such evidence alone is sufficient to require a dismissal of the charges because of the Due Process and speedy trial violations. See also *United States v. Lovasco*, 431 U.S. 783 (1977), where this Court said (fn. 17): "In *Marion* we noted with approval that the Government conceded that a 'tactical' delay would violate the Due Process Clause." Prejudice is not mentioned as an essential element for the due process violation by tactical delay.

Although *United States v. Jackson*, 504 F. 2d 337 (8th Cir. 1974), cert. den. 420 U.S. 964 (1975), also involved pre-indictment delay, footnote 2 on page 339 would indicate that prejudice need not always be proved but may in some instances "be presumed in an outrageous case of unjustified delay." The footnote continues:

> "We agree that, at least where the government is not engaging in intentional delay in order to gain a tactical advantage over the accused, the defendant must affirmatively demonstrate prejudice."

The logical corollary of this statement is that petitioner here is not required to demonstrate prejudice. Compare *United States v. Quinn*, 540 F. 2d 357 (8th Cir. 1976), in which the Court, at footnote 2 on page 360, states that it left unresolved the question of whether *United States v. Marion* requires the two elements of prejudice and intentional device to gain tactical advantage.

In *United States v. Didier*, 542 F. 2d 1182 (2nd Cir. 1976), the facts are interestingly analogous in that the government there obtained delays in the trial in order to secure the testimony of a co-defendant against Didier. The Second Circuit said (l.c. 1187):

> "The government's desire to await the results of [the co-defendant's] appeal, however, was clearly not a sufficient reason for delay. . . . At best the requested delay was a government maneuver designed to bolster its case against Didier; if [the co-defendant's] conviction in the Fifth Circuit should be affirmed, thus assuring that he would serve a sentence on that charge, conviction of [the co-defendant] in the present case would become less important and the government would be willing to give him immunity for his testimony against Didier. *The desire to gain such a tactical advantage, however, is not a sufficient reason for trial delay.* Cf. *United States v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 30 L.Ed. 2d 468 (1971)." [Emphasis supplied.]

The Second Circuit ordered the *Didier* indictment dismissed without any further requirement of showing prejudice to the defendant. No prejudice appears from the opinion other than the tactical advantage, and it is obvious that the Second Circuit does not construe *United States v. Marion* to impose a two-fold test requiring a showing of prejudice in addition to the intentional device to gain tactical advantage.

We believe the record in the instant case demonstrates that there was intentional delay on the part of the government to gain the tactical advantage whereby they could use Elliott as a witness against petitioner. This constituted a violation of Fifth Amendment Due Process and Sixth Amendment speedy trial rights.

This petition presents a conflict between the decision of the Sixth Circuit herein and decisions of the Second and Eighth Circuits over interpretation of the opinion of this Court in *United States v. Marion*, with reference to whether prejudice to a defendant need be shown where there is an intentional delay to gain tactical advantage over the defendant. We respectfully submit that this conflict should be resolved.

Even if this Court were to decide that a showing of prejudice is required, this case also presents an opportunity to set

guidelines as to what constitutes prejudice and tactical advantage. We submit that until these issues are definitely clarified by this Court, lower courts will add to the confusion in the law as to speedy trial violations, and petitions will continue to be presented to this Court for such clarification.

Because of the conflict between the Circuits and the need for clarification of this important constitutional issue, we respectfully submit that certiorari should be granted as to this Question.

II

Impeachment of Petitioner

At approximately 2:30 A.M. on October 13, 1975, petitioner was arrested by Police Officer Larsen in Lakeville, Minnesota (Tr. 115, A-103). After some preliminary discussions, Officer Larsen asked petitioner the identity of another person in the truck with him, and, according to the officer, petitioner replied that the man was James Langston and that he did not know him very well (Tr. 126, A-105). Thereafter, on cross-examination, the officer testified that petitioner said he knew Langston for a couple of days (Tr. 193-194, A-107-108), but the officer acknowledged that Officer Moody, who assisted him, had written a report in which he stated that petitioner said that he knew Langston for two or three months (Tr. 195-196, A-108-109).

Although petitioner never took the stand as a witness, the prosecutor attempted to impeach his credibility by other evidence that petitioner may have been acquainted with Langston (who turned out to be James Elliott) for longer than two to three days or two to three months. The issue was squarely presented to the District Court with telephone records produced by witness Porter, reflecting calls from the telephone of June

Collier to petitioner's telephone in July, 1975 (Tr. 321-322, A-113-114). The District Court indicated, as a basis for its ruling, that "it appears that there may be an issue on the question of credibility" of petitioner (Tr. 323, A-115), and the Court acknowledged that the ruling would stand even though it might be impeachment of a defendant who might not take the stand (Tr. 327, A-118).

Subsequently, June Collier was called as a witness. She testified that she had lived with Elliott, and that she first met petitioner in March, 1975 (Tr. 383, A-140). Mrs. Collier was permitted to testify that Elliott made calls to petitioner's telephone in April and June of 1975 (Tr. 397, A-154).

Inasmuch as petitioner did not testify as a witness at this trial, we believe that the telephone records and the testimony of Mrs. Collier were erroneously admitted. In effect, what the government did was to present petitioner's statement and then attempt to impeach his credibility by showing contradictory evidence. We submit that this cannot be done until and unless the defendant becomes a witness in the case. Significantly Rule 607 of the Federal Rules of Evidence speaks of impeachment of "a witness", and not impeachment of a defendant or a party generally.

In *United States v. Cochran*, 499 F. 2d 380, 393 (5th Cir. 1974), the defendant sought to impeach a person who had been a link in the chain of evidence against him but who did not testify at the trial. The Fifth Circuit held that this could not be done, because, among other reasons, the person "was not a witness and therefore was not the subject of impeachment."

In *United States v. Nemeth*, 430 F. 2d 704 (6th Cir. 1970), the error in admission of evidence concerning a prior conviction for the same offense was not cured by the trial Court's limiting instructions, the Court of Appeals stating (l.c. 706): "Evidence of this fact even if properly documented, would

clearly be inadmissible where the defendant does not testify and his character is not otherwise in issue." See also *United States v. Rudolph*, 403 F. 2d 805, 806 (6th Cir. 1968), where the Court said that when a defendant had not taken the witness stand, there was no occasion to offer impeachment evidence against him.

To permit the government to introduce evidence for the purpose of then contradicting the evidence, and thereby impeaching the veracity of a defendant who does not testify, would open the trial to all sorts of collateral issues and make a non-testifying defendant's credibility an issue in any case. It would nullify the defendant's right to elect not to testify and force him to take the stand, inasmuch as his credibility would have already been placed in issue. Compare *United States v. Hale*, 422 U.S. 171 (1975), and *Doyle v. Ohio*, 426 U.S. 610 (1976). In addition, it could often, as it did here, require a defendant to be ready for prosecution evidence of events prior to those involved in the trial, without advance warning from the prosecutor that such an issue would be injected into the trial and without an adequate opportunity to investigate and secure rebuttal testimony. (See further discussion on this problem in Question III of this petition.)

Based upon these authorities and the general rules against impeachment of credibility of a defendant who has not taken the stand to testify, we believe that the telephone records and the testimony of Mrs. Collier were improperly admitted. The Court of Appeals, in summarily denying relief to petitioner, has infringed upon his Fifth Amendment right to remain silent and has disregarded the rationale of the decisions of this Court in *Hale* and *Doyle*.

We respectfully submit that certiorari should be granted as to this Question.

III

Prior Acts

At the time the issue as to impeachment of petitioner's statement arose, the Court and counsel anticipated and began to discuss an issue as to the admissibility of evidence of conduct of petitioner and Elliott at times prior to the period alleged in the indictment. The indictment (A-4) alleged that the conspiracy commenced on or about September 20, 1975, and that the events charged in the substantive counts occurred on or about September 27 and October 13, 1975. At first the District Court suggested that an event of September 18, 1975, was admissible as within the framework of an allegation of "on or about" (Tr. 321, A-113). Then, the government indicated a desire to go back farther into history, and the District Court took the position that the evidence was properly admissible to impeach petitioner's statement made at the time of his arrest (Tr. 323, 327, A-115, 118). (See Question II of this petition.) Finally, the issue was directly raised when the government stated that they wanted to show that petitioner and Elliott "were in the stealing business" by evidence long prior to the indictment dates (Tr. 335, A-122). The Court seemingly reserved ruling on this latter issue (Tr. 337-338, A-124-125).

Thereafter, during the testimony of witness June Collier, the issue focused directly on acts which took place long prior to the indictment period, and the Court suggested admissibility to show "a course of conduct" (Tr. 390-392, A-147-149). Subsequently the Court spoke of limiting this conduct which "is similar in type, kind and character and modus operandi" to a period of time sufficiently near the indictment period, which the Court explained to be "six months or thereabouts" (Tr. 394, A-151). Mrs. Collier was then permitted to testify concerning activities of petitioner and Elliott in "spotting" or locating ve-

hicles for stealing, both before and after July (Tr. 400-402, A-157-159). She testified as to one specific instance of their taking a truck to Michigan (Tr. 401, A-158).

The issue again arose in discussions during the testimony of Elliott when his statements to an FBI agent were being examined (Tr. 480, A-186). The Court, after reviewing the statements, referred to a Michigan and another Indiana matter (Tr. 481, A-187). Defense counsel complained about the inability to investigate matters which were not alleged in the indictment, and which appeared as a factual issue in the case only after the trial had commenced (Tr. 484-485, A-190-191). After some discussion as to the applicability of the course-of-conduct exception in a case in which both a conspiracy and substantive counts are charged, the Court ruled that only the one incident most closely related in time would be admitted (Tr. 491-492, 546, A-197-198, 202). Then in a voir dire examination of Elliott, it was determined that the incident to be admitted into evidence concerned the taking of a truck to Michigan and subsequently returning to Michigan and delivering the truck to Minnesota (Tr. 547-549, A-203-205). Elliott was then permitted to testify before the jury that he and petitioner had been to Minnesota previously, by way of Michigan, to deliver a truck; that there had been a prior trip to Muskegon, Michigan; that the trip had started in Sikeston, Missouri, where the truck had been stolen; and that the money received from this trip was split equally between petitioner and Elliott (Tr. 558-560, A-206-208).

The result was that Elliott testified about an incident that took place prior to the time alleged in the indictment, without any indication in the indictment or pre-trial discovery or anywhere else that such alleged illegal conduct would be brought into the trial. It was obvious that the information first became known to defense counsel after the Court *in camera* examined some statements of Elliott which had been shown only

in part, as Jencks material, to petitioner; they were finally given to petitioner only after the Court ruled on the admissibility of this testimony (Tr. 480-482, A-186-188). There was no forewarning that a factual issue might develop during the trial as to events which had allegedly taken place in Sikeston, Missouri, and Michigan and Minnesota prior to the events alleged in the indictment; petitioner, finding himself in trial in Memphis, was unable to investigate this matter or attempt to locate witnesses in his behalf to counteract the poisonous testimony of Elliott.

Petitioner recognizes that Rule 404(b) of the Federal Rules of Evidence does discuss the admissibility, under certain circumstances, of evidence of other crimes and prior acts, but we believe that this was not an appropriate case to come within that exception. Any probative value was "substantially outweighed by the danger of unfair prejudice." See Rule 403 of the Federal Rules of Evidence. Numerous cases discuss this issue in terms of a balancing of probative value and prejudicial effect. Here, the prejudicial effect was obvious, and we believe that under the circumstances of this particular case it should not have been admitted.

If there were in fact other crimes, then such other crimes should have been alleged in the indictment as substantive counts for which petitioner could have been prepared to defend. At the very least, it would seem that the prior acts would have been part of a conspiracy, but the government did not even allege that these other crimes occurred within the period of time embraced by the allegations of the conspiracy count. The government was bound by the indictment and should not be permitted to amend and expand the indictment by its evidence.

At the trial (Tr. 486, A-192), the government sought to rely on *United States v. Mahar*, 519 F. 2d 1272 (6th Cir. 1975), cert. den. sub nom. *Harris v. United States*, 423 U.S. 1020

(1975), but we believe this case is not only distinguishable but is in fact authority for the exclusion of the evidence. In its discussion of the balancing of probative value and prejudicial effect, the Court stated that the trial judge did everything possible to minimize the prejudicial effect, and commented that "the defendants and their counsel were informed that this testimony would be received before trial."

In the instant case there was no minimization of prejudicial effect and no such disclosure of the intent to use this prejudicial testimony. By pleading a conspiracy commencing on September 20, 1975, the government not only did not disclose the intent to use this evidence but, in effect assured petitioner that it would not be used. They never attempted through any bill of particulars to expand the period of time nor by any other pre-trial disclosure to indicate that the Michigan incident would be used in evidence.

The unfairness of such a situation is manifest from the surprise to the defense and the inability to investigate or to be prepared to defend against events which were distant in time and place. We recognize that "surprise" as such is not a ground for exclusion under Rule 403. See historical discussion in 10 Moore's Federal Practice § 403.14 and 1 Weinstein's Evidence, para. 403[01], pages 403-9 ff. The suggestion that a continuance is a satisfactory remedy for surprise is inapplicable here, where the trial was into its third day and last witness. And even though surprise is not an enumerated factor in Rule 403, it should certainly be a controlling reason to find a "danger of unfair prejudice". Compare Rule 303(1)(c) of the Model Code of Evidence and Rule 45(c) of the Uniform Rules of Evidence.

The language of *Michelson v. United States*, 335 U.S. 469, 475-476 (1948), is particularly appropriate, for there this Court discussed other evidence relating to a defendant's character and said:

"Not that the law invests the defendant with a presumption of good character, Greer v. United States, 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, *unfair surprise* and undue prejudice." [Emphasis supplied.]

Although we do not recognize the propriety of this evidence under any circumstances, we believe at the very least that if the government intended to use it, they should have disclosed it prior to trial so that petitioner could have prepared to meet such evidence. Perhaps this is a factor which a District Court might consider in determining the prejudicial effect, but if it is only a factor and not an iron-clad test, then under the circumstances of this case the prejudicial effect certainly outweighed the probative value.

Some courts have recognized the unfairness of evidence of prior misconduct without advance notice, and have established procedural safeguards, including pre-trial notice. See *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965), *State v. Billstrom*, 276 Minn. 174, 149 N.W.2nd 281 (1967), and *State v. Prieur*, 277 So. 2d 126 (La. 1973). We submit that such safeguards should be adopted in the application of Rule

404(b), so as to be within the framework of the Sixth Amendment right to be informed of the nature and cause of the accusation.

Perhaps no portion of the Federal Rules of Evidence is generating more discussion and lower court problems in criminal proceedings than Rule 404(b). It would be appropriate for this Court to establish some guidelines for harmonizing Rule 404(b) with Rule 403. This case presents an opportunity to lessen the arguments and appeals on this subject.

For these reasons, we respectfully submit that certiorari should be granted as to this Question.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 77-5221

United States Court of Appeals
for the Sixth Circuit

United States of America,
Plaintiff-Appellee

v.

Charles Edward Hampton,
Defendant-Appellant.

ORDER

(Filed March 2, 1978)

Before Phillips, Chief Judge, and Weick and Keith, Circuit Judges.

Appellant, Charles Edward Hampton, was convicted at a jury trial in the United States District Court for the Western District of Tennessee of conspiracy and transportation of stolen motor vehicles in interstate commerce. One of the witnesses for the Government was James Elliott, an accomplice of Hampton, who previously had pleaded guilty to the charges in the indictments. The evidence established that Hampton and Elliott had stolen motor vehicles, principally farm equipment, in Indiana and Tennessee and transported them to other states, including Missouri and Minnesota.

Prior to Elliott's plea of guilty, the district court granted Hampton's motion to suppress certain evidence. Elliott thereafter escaped. The Government filed an interlocutory appeal to this court from the order granting the motion to suppress. This

appeal was dismissed on motion of the Government after Elliott was apprehended. Appellant contends that the Government's appeal was taken in bad faith for the purpose of delay and for obtaining a tactical advantage, depriving Hampton of a speedy trial. We conclude that this contention is without merit.

Appellant also asserts the district court erred in admitting evidence concerning his prior false statements to police and of similar unlawful acts not charged in the indictment. We conclude that there is no merit in these contentions.

Accordingly, it is Ordered that the judgment of conviction be and hereby is affirmed.

Entered by order of the court.

/s/ JOHN P. HEHMAN
Clerk

APPENDIX B

No. 77-5221

United States Court of Appeals
for the Sixth Circuit

United States of America, Plaintiff-Appellee, v. Charles Edward Hampton, Defendant-Appellant.	ORDER DENYING PETITION FOR REHEARING

(Filed April 17, 1978)

Before Phillips, Chief Judge, and Weick and Keith, Circuit Judges.

No judge of the court having moved for rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is Ordered that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ JOHN P. HEHMAN
Clerk

APPENDIX C

In the United States District Court for the
Western District of Tennessee
Western Division

United States of America
v.
Charles Edward Hampton and James Thomas Elliott, Jr.
} No. CR-76-20

ORDER

(Filed Dec. 7, 1976)

The defendant, Hampton, through his counsel in this cause, has moved for a severance. The United States has subsequently, in view of developments set out in its motion for a severance, concurred that under the requirements of *Bruton v. United States*, 391 U.S. 123 (1968), the defendants should be tried separately.

In light of the matters in the record and those called to the Court's attention in the process of hearings preliminary to trial in this cause, the Court will grant the motion for severance and the defendants will stand for trial separately. The Court will set the trial of James Thomas Elliott, Jr. on the Bail Reform Act charge and on the charge set out in this indictment for trial prior to the trial of the defendant, Hampton, in lieu of the intervening appeal in the case pertaining to Hampton on the Court's ruling on a matter of evidence.

This 7th day of December, 1976.

/s/ HARRY W. WELLFORD
United States District Court Judge

APPENDIX D

In the United States District Court for the
Western District of Tennessee
Western Division

United States of America
v.
Charles Edward Hampton.
} No. CR-76-20.

ORDER

(Filed February 8, 1977)

The defendant, Hampton, in this cause has moved for a disclosure of information pertaining to the circumstances of the appeal taken by the government in this case from this Court's Order on the defendant's motion to suppress entered November 2, 1976. At the time of the entry of this Order, the Court considered approximately four areas of controversy relating to the seizure by government authorities of evidence involving this defendant and co-defendant, Elliott, in or about Lakeville, Minnesota. The evidence in the case presented close questions, but the Court resolved the doubts in favor of the defendant and suppressed certain items recognizing that there was a considerable difference of opinion relating to the circumstances involved. See, for example, *United States v. Martinez-Fuerte*, —U.S.— (No. 74-1560, 7/6/76).

Following the entry of this Order, the United States, on November 8, 1976, filed a notice of appeal.

The defendant, Hampton, on January 6, 1977, filed a motion to dismiss asserting that the appeal taken by the government

was not for a legitimate purpose, but was rather for the purpose of delaying the proceedings and violated the defendant's rights with regard to speedy trial and otherwise. The Court ordered a hearing on the defendant's motion and at the hearing it was brought out there were motions for severance in this case which the Court has considered, holding a hearing with regard to the severance matter and the suppression matter on October 1, 1976. Previously, on August 27, 1976, the co-defendant, Elliott, in this case had failed to appear and a warrant was issued for his arrest, Elliott being at large. The record further shows that Elliott was arrested on or about October 27, 1976, and on October 29, he appeared before the Magistrate of this Court. All of this occurred prior to the Court's Order on the motion to suppress and the notice of appeal by the government.

The record further shows the government ordered the transcript of the suppression hearing in connection with its notice of appeal before and received the transcript, although there was a question from the Department of Justice as to whether the appeal should be pursued.

The Court, on December 7, 1976, ordered a severance in this case requiring the trial of Elliott before the trial of the defendant, Hampton, and noting at that time the factors involved, including the pendency of the appeal which was subsequently dismissed after the Court's Order on severance.

The Court concludes that the evidence does not show that the appeal was taken in order to gain an improper tactical advantage over the defendant, Hampton. There has been no showing of prejudice made by the defendant by reason of delay in this case and the authorities relied upon by the defendant involved serious delay prior to indictment. It is further to be noted that the government's appeal from this Court's Order on the motion to suppress was not actually dismissed until January 31, 1977, and that the government understandably had some

reluctance on having to depend upon the testimony of the co-defendant who is an often-convicted felon.

The defendant, Hampton, has not shown a basis for dismissal in this case and the motion to dismiss is overruled.

The government's motion for a resetting of the case, under all the circumstances, is sustained, it having been noted that the defendant's counsel has previously sought and has obtained a continuance or continuances. The case is reset to *March 14, 1977*.

This 8th day of February, 1977.

/s/ Harry W. Wellford
United States District Court Judge

No. 77-1639

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHARLES EDWARD HAMPTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
JOHN VOORHEES,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1639

CHARLES EDWARD HAMPTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A) is not reported. The order of the district court (Pet. App. D) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1978. A petition for rehearing was denied on April 17, 1978. A petition for a writ of certiorari was filed on May 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a speedy trial by the government's engaging in dilatory procedural maneuvers in order to gain a tactical advantage over petitioner.

2. Whether the district court erred in admitting evidence contradicting statements petitioner made at the time of his arrest.

3. Whether the district court properly admitted evidence of petitioner's delivery of a stolen truck one month before he was arrested for delivering stolen tractors.

STATEMENT

Following a jury trial in the Western District of Tennessee, petitioner was convicted of two counts of interstate transportation of stolen motor vehicles, in violation of 18 U.S.C. 2312 and 2, and one count of conspiracy to transport stolen motor vehicles, in violation of 18 U.S.C. 371. He was sentenced to two concurrent terms of five years' imprisonment on the substantive counts and a consecutive term of five years' imprisonment on the conspiracy count. The court of appeals affirmed (Pet. App. A).

The government's evidence disclosed that petitioner and an accomplice, James Elliott, travelled together through several mid-western states stealing farm equipment and motor vehicles. Elliott testified that from September 20, 1975, through October 13, 1975, he and petitioner stole tractors and vehicles in Indiana and Tennessee and transported them to other states. In the early hours of October 13, 1975, petitioner and Elliott were stopped by the police in Lakeville, Minnesota, while they were driving a tractor-trailer transporting two farm tractors. After checking the serial number on the tractors, the police determined that one of the tractors was stolen.[1] Thereupon petitioner was arrested (Br. 9-12).

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[1]Elliott escaped on foot and was apprehended several months later. The police subsequently determined that the other tractor and the truck's trailer were also stolen.

ARGUMENT

1. Petitioner contends that the government deliberately delayed his trial by filing a notice of appeal from the district court's suppression order for the purpose of gaining a tactical advantage. The delay, it is alleged, was used to induce his codefendant Elliott to plead guilty, thereby making him available as a government witness at trial. These procedural maneuvers, petitioner argues, resulted in the denial of a speedy trial.

Petitioner and Elliott were indicted on February 10, 1976 (Pet. 11), and trial was originally scheduled for the week of August 30, 1976. Elliott failed to appear, and a bench warrant was issued for his arrest. While the case was being continued, petitioner filed motions to sever his case from Elliott's and to suppress evidence. Elliott was arrested on October 27, 1976, and on November 2, 1976, the district court granted in part petitioner's motion to suppress (Pet. 7; Pet. App. A-6).

On November 8, 1976, the government filed a protective notice of appeal in the district court. A transcript of the suppression hearing was transmitted to the Criminal Division of the United States Department of Justice on November 24, 1976. On December 22, 1976 the United States Attorney received a teletype from the Department advising him that on December 14, 1976 the Solicitor General had decided against appeal (C.A. App. A-74 to A-78).[2]

On January 6, 1977, petitioner filed a motion to dismiss his indictment alleging that the government had filed its notice of appeal to obtain a tactical advantage (Pet. App. A-5 to A-6) by delaying petitioner's trial in order to secure

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[2]On January 14, 1977, the government moved to dismiss its appeal. The appeal was dismissed on January 31, 1977 (Pet. App. A-7; C.A. App. A-25 to A-26). "C.A. App." refers to the joint appendix in the court of appeals.

the testimony of codefendant Elliott, who had pleaded guilty on December 29, 1976. The district court ruled there was no evidence that the appeal was taken by the government in order to gain a tactical advantage or that petitioner was prejudiced by the delay (Pet. App. A-6). The court of appeals agreed (Pet. App. A-2).

Since both courts below found that the delay between November 8, 1976, when the government filed its notice of appeal, and December 29, 1976, when the prosecutor informed the court that the government was voluntarily withdrawing its appeal, was not for the purpose of obtaining a tactical advantage, this Court should not review this factual determination "in the absence of a very obvious and exceptional showing of error." *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635. Here, in fact, petitioner has introduced no evidence to support his allegation. Instead, the record shows that the prosecutor was merely following established procedures of informing the Department of Justice of the loss of suppression issues and allowing the Department to make an informed decision on appealing the district court's order.[3] Accordingly, petitioner's conclusory claim presents no issue meriting further review.[4]

2. Petitioner also contends that the district court erred in admitting evidence of telephone records and the testimony of a witness, June Collier, which demonstrated there were

[3]The Solicitor General is responsible for "[a]uthorizing or declining to authorize appeals by the Government to all appellate courts." 28 C.F.R. 0.20(b).

[4]This case has no resemblance to *United States* v. *Didier*, 542 F. 2d 1182 (C.A. 2) upon which petitioner principally relies (Pet. 18-19). There the court held that the defendant was denied his right to speedy trial when the government delayed his retrial for 28 months until the court of appeals rendered a decision in a codefendant's case. The government had no sufficient reason for the delay which violated the local speedy trial plan that required retrial within 60 days.

discrepancies in statements made by petitioner to two officers at the time of his arrest (Pet. 3, 20-21).

When petitioner was stopped driving a tractor-trailer carrying stolen tractors, the officers noticed another man in the cab of the tractor-trailer who disappeared when petitioner was arrested. Officer Larson testified that petitioner stated that the other man was James Langston and that he had known Langston for only several days (C.A. App. A-105). On cross-examination by petitioner's counsel, Officer Larson testified that petitioner told another officer that he had known Langston for two or three months (C.A. App. A-108 to A-109). Codefendant Elliott testified that he was with petitioner when he was arrested in Minnesota and had known him since the late Fall of 1974. Over petitioner's objection, the government introduced telephone records showing that Elliott called petitioner in June and July 1975 and testimony from Elliott's former girlfriend, June Collier, that petitioner had visited her at Elliott's apartment in March 1975 (C.A. App. A-140 to A-141). Petitioner did not testify.

Since it was petitioner's defense that he was a truck driver who had been asked to haul tractors to Minnesota which he did not know were stolen, evidence that when he was stopped by the police he gave false statements about his traveling companion, was properly admitted as relevant to establish his motive and intent. See Rule 404(b), Fed. R. Evid. Petitioner's claim that the evidence cannot be used to impeach him since he did not take the stand is without foundation. Where, as here, statements of a defendant have been elicited by the defense, it does not infringe the defendant's right against self-incrimination for the prosecution to impeach the truthfulness of those statements

although the defendant did not take the stand. See, *e.g.*, *United States* v. *Kahan*, 415 U.S. 239; *United States* v. *Pistante*, 453 F. 2d 412 (C.A. 9). In any event, petitioner does not challenge the admissibility of Elliott's testimony that he had known petitioner for at least a year prior to his arrest and that he was with petitioner when he was arrested in Minnesota. Since the jury learned of the discrepancies through his own counsel's cross-examination and Elliott's testimony, petitioner can hardly be heard to complain that he was prejudiced by evidence which merely corroborated Elliott's testimony.

3. Finally, petitioner contends (Pet. 23-28) that the district court erred in admitting evidence that he and Elliott had previously been to Minnesota to deliver a stolen truck.

Shortly after his arrest, Elliott gave statements to the F.B.I. indicating that he and petitioner had engaged in several thefts of motor vehicles and farm equipment. The district court reviewed these statements *in camera* (C.A. App. 186) and ruled that the government was entitled to introduce evidence of the one incident "most closely related in time" to show a common plan or scheme (C.A. App. A-196 to A-198). Accordingly, Elliott testified at trial that a month before he and petitioner delivered the farm equipment to Minnesota, they stole a truck in Missouri, delivered it to Minnesota, and split the proceeds (C.A. App. A-206 to A-208).

The district court plainly did not abuse its discretion under Rule 404(b) in admitting this evidence which disclosed petitioner's plan of stealing heavy farm equipment and motor vehicles and delivering them in another state for resale and rebutted petitioner's defense that he had no knowledge that the tractors he was delivering to Minnesota were stolen. See *United States* v. *Gamble*, 541 F. 2d 873 (C.A. 10); *United States* v. *Nasse*, 432 F. 2d 1293 (C.A. 7), certiorari denied, 401 U.S. 938.

Petitioner's prior participation with Elliott in auto theft was also relevant to establish the existence of the conspiracy to transport stolen motor vehicles with which petitioner was charged (541 F. 2d at 878).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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JULY 1978.

DOJ-1978-06